INTERIOR BOARD OF INDIAN APPEALS

Bernell Kombol, d.b.a. Grass Mountain Logging Co.
v. Acting Assistant Portland Area Director, Bureau of Indian Affairs

19 IBIA 123 (12/26/1990)

Related Board case:
21 IBIA 116

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

BERNELL KOMBOL, d.b.a. GRASS MOUNTAIN LOGGING CO.
v.
ACTING ASSISTANT PORTLAND AREA DIRECTOR (ECONOMIC DEVELOPMENT), BUREAU OF INDIAN AFFAIRS

IBIA 90-31-A Decided December 26, 1990

Appeal from a determination of breach of a timber contract.

Affirmed.

1. Indians: Timber Resources: Timber Sales Contracts: Breach and Damages

   Failure to make advance deposits required under a contract for the sale of Indian timber or to begin operations constitutes a breach of the contract.

2. Appeals: Generally--Indians: Generally

   The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

3. Administrative Procedure: Standing--Indians: Contracts: Generally

   A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

4. Indians: Timber Resources: Generally

   The sale of timber on trust or restricted land by an Indian tribe is controlled by 25 U.S.C. § 407 (1988), not by 25 U.S.C. § 81 (1988).

5. Indians: Timber Resources: Timber Sales Contracts: Breach and Damages

   Performance under a contract for the sale of Indian timber is not excused by the doctrine of commercial impracticality based upon a downturn in the timber

market when the possibility of such a downturn is not shown to have been an unexpected or unforeseeable occurrence, the risk of such a downturn is allocated to the purchaser by the terms of the contract, and the purchaser has not shown that performance is commercially impracticable.

APPEARANCES: Jan D. Sokol, Esq., Portland, Oregon, for appellant; Michael E. Drais, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Frank R. Jozwiak, Esq., Seattle, Washington, for the Makah Indian Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Bernell Kombol, d.b.a. Grass Mountain Logging Company, seeks review of an August 8, 1980, decision of the Acting Assistant Portland Area Director (Economic Development), Bureau of Indian Affairs (Area Director; BIA), finding appellant in breach of the Blowdown '79 Logging Unit Contract No. P10C14200363 on the Makah Indian Reservation, Washington. This appeal was remanded to the Department of the Interior by the United States District Court for the Western District of Washington in United States v. Kombol, No. C86-1764(M)WD for the completion of administrative review procedures. For the reasons set forth in this opinion, the Board of Indian Appeals (Board) affirms that decision.

Background

By memorandum dated July 13, 1979, the Superintendent, Olympic Peninsula Agency (Agency), BIA (Superintendent), wrote the Area Director, proposing a sale of timber on the Makah Indian Reservation. The sale was authorized by tribal resolution. Most of the timber in the proposed sale had blown down during a February 1979 storm and, consequently, was subject to continued deterioration. Designated the Blowdown '79 Logging Unit, the sale encompassed 116 acres, more or less, of tribal land in eight logging blocks within portions of secs. 12 and 17, T. 32 N., R. 15 W., and sec. 1, T. 33 N., R. 16 W., Willamette Meridian, Washington. The estimated volume of the sale was 4,673 thousand board feet (MBF) of mixed old growth with an appraised value at that time of $642,865.55. 1/

BIA's lowest acceptable advertised rate for the sale was the appraised value of $642,865.55. Appellant was the high bidder at $986,352.90. 2/ Appellant was apparently informed by telephone sometime after September 25 and before September 28, 1979, that he would be awarded the contract. By letter dated September 28, 1979, appellant presented a proposed logging plan, indicating that "[l]ogging will start within thirty days upon

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1/ The timber was broken down into an estimated 1,682 MBF of Western Red Cedar sawlogs, 2,337 MBF of Western Hemlock and 0 sawlogs, 420 MBF of Pacific Silver Fir sawlogs, and 234 MBF of Sitka Spruce sawlogs. There was also an undetermined amount of No. 4 logs and cull logs of all species.

2/ The three remaining bids were for $816,826.80, $804.021.35, and $701,905.20.

receipt of the logging contract." The contract required appellant to "cut and pay for all designated timber on or before August 31, 1980, and [to] complete all other obligations on or before the contract expiration date of December 31, 1980" (Contract paragraph A5).

Appellant signed the contract on October 11, 1979. Because of problems with the performance bond appellant submitted, the contract was not signed by the Area Director until January 14, 1980. 3/ Two copies of the approved contract and bond agreement were returned to appellant by the Agency Forest Manager by letter dated January 18, 1980. The letter stated: "It is requested that you arrange with this office prior to the end of January 1980, a formal logging conference to discuss the contract obligations of this sale."

After an additional request from BIA, a conference was held on March 10, 1980. Among other topics of discussion, appellant requested a 120-day extension to complete the contract because of the delay in approval; the parties set March 31, 1980, as the tentative start date for logging; and appellant was reminded that he was required to prepay an additional $91,000 before he could begin operations. 4/ By letter dated March 19, 1980, the Superintendent extended the period to cut and pay for timber from August 31, 1980, until October 31, 1980. All other provisions of the contract remained the same.

Appellant did not make the required prepayment and did not begin operations. Following numerous additional letters, telephone conversations, and personal meetings, appellant was informed that if he had not deposited the remainder of his advance deposit and begun operations by July 15, 1980, he would be considered to be in breach of the contract. On July 3, 1980, appellant wrote the Agency, stating:

> This is to inform you that I am going to postpone logging Blowdown '79 timber sale until market conditions improve. At that time I will proceed with as many sides (whether 2-4-6) to complete this contract in the allotted time.
>
> It is to your discretion if you wish to relieve me of this contract.

The Superintendent responded to appellant by letter dated July 22, 1980, stating:

3/ Section A10 of the contract required a performance bond in the amount of $32,000. Although appellant submitted a bond, it was not of a type acceptable to BIA. Appellant furnished a bond in the required amount from United Pacific/Reliance Insurance Companies, Federal Way, Washington (United Pacific). United Pacific has not appeared on its own behalf in this proceeding.

4/ Section A8 of the contract required an advance deposit of $110,000. Appellant paid $19,000 with his bid offer. This left a remainder of $91,000 to be paid before operations began.

> This office has repeatedly requested your compliance with the contract term on the Blowdown '79 Logging Unit Timber Sale Contract No. P10C14200363, Makah Reservation; specifically, the request for compliance for the payment of the Advance Deposit of $91,000 and the commencement of logging as agreed upon in the March 10, 1980, logging conference held at Neah Bay, Washington.
>
> Based on the fact that you have failed to accomplish the above, we are taking the following actions regarding your June 18th request for an extension and your July 3rd letter postponing the logging. Your June 18th request is hereby denied. Your right to operate under this timber contract is hereby suspended in accordance with Timber Contract Standard Provision B2.6. [5/]
>
> If payment of the $91,000 Advance Deposit request is not received within ten (10) days of your receipt of this letter, we will recommend to the Approving Officer that this contract be revoked.

Appellant did not make the advance deposit and did not begin operations within the specified time. Accordingly, by letter dated August 8, 1980, he was informed by the Area Director:

> 1. Pursuant to Standard Provision paragraphs B2.6 and B2.7, [6/] you are hereby advised you are in breach of the Contract No. P10C14200363, Blowdown '79 Logging Unit, and all rights of Grass Mountain Logging Company, under the contract are revoked, and Grass Mountain Logging Company shall be liable for such additional damages as may be determined.
>
> 2. The $19,000.00 deposit with bid, now on deposit, is declared forfeited to the Makah Tribe as partial compensation

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5/ Section B2.6 provides for suspension of operations:

"The Superintendent may, after written notice to the Purchaser, suspend any or all of the Purchaser's operations under the contract if the Purchaser violates any of the requirements of the contract. * * * Such suspension of operations may be continued by the Superintendent until there is satisfactory compliance. After written notice from the Superintendent, continued failure to comply with any of the requirements of the contract shall be grounds for the revocation by the Approving Officer of all rights of the Purchaser under the contract and the Purchaser shall be liable for all damages resulting from his breach of contract as described in the following section."

6/ Section B2.7 provides:

"In the event of failure to complete all obligations assumed under the contract, the Purchaser shall be liable for the depreciation in the value for the remaining timber and for any costs or expenses incurred by or caused to the Seller or the Government as a result of such failure, in an amount to be determined by the Approving Officer."

for nonperformance penalty under the terms of Standard Provision B4.34. [7/]

3. The Superintendent, Olympic Peninsula Agency, will be directed to start readvertisement of the Blowdown '79 Logging Unit within 10 days of this memorandum.

Appellant was informed of his right to appeal this decision to the Commissioner of Indian Affairs (Commissioner) under 25 CFR 2.10 (1980).

Appellant's notice of appeal, dated September 2, 1980, was incorrectly filed with the Superintendent, who forwarded it to the Area Director, who in turn forwarded it to the Commissioner. The Area Director's September 19, 1980, transmittal memorandum requested that the Commissioner require a cash appeal bond in the amount of $152,000 to protect the interests of the Makah Tribe (tribe). The Area Director further requested that the Commissioner require the appeal bond to be furnished within 15 days of the date when appellant received the letter requiring a bond.

Appellant filed reasons in support of his appeal with the Commissioner. Appellant cited two grounds for his appeal: (1) the contract did not require him to cut and pay for timber until October 31, 1980. Therefore, when action was commenced against him on August 8, 1980, he still had time and the capability to complete all obligations under the contract; and (2) by not granting the 6-month extension of time for completion which he had requested because of the depressed state of the cedar market in the area, BIA violated the implied understanding of the contract that required cooperation between the owner and the contractor with respect to economically profitable completion of the contract.

By telegram sent on October 23, 1980, the Commissioner acknowledged receipt of appellant's notice of appeal and required appellant to post a cash appeal bond in the amount of $130,000 with the Superintendent by 5 p.m., November 3, 1980. The telegram further stated: "Failure to post the appeal bond will be cause for dismissal of your appeal."

Appellant did not post the appeal bond. Instead, by letter dated November 5, 1980, and received by BIA on November 10, 1980, he appealed from the imposition of the appeal bond requirement, arguing that it had deprived him of due process of law and bore no relation to the loss, if any, with which BIA was faced. Appellant contended that a hearing should have been held on the matter.

By telegram dated November 6, 1980, the Acting Deputy Commissioner notified appellant that:

I herewith dismiss the Grass Mountain Logging Company appeal * * *. Since this decision is based on the exercise of my

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7/ Section B4.34 provides in pertinent part: "[N]o refund [of advance deposits] shall be made if an unexcused deficiency in minimum cutting requirements exists."

> discretionary authority, it is final for the Department of the Interior. I am, therefore, directing the Portland Area Director to immediately advertise the resale of the Blowdown '79 Logging Unit to partially mitigate losses incurred by the Makah Tribe.

The Commissioner responded to appellant's appeal from the imposition of the bond by letter dated January 5, 1981, informing him that the appeal bond requirement was final for the Department.

By letter of May 14, 1981, appellant and United Pacific were informed of BIA's initial determination of damages. This determination was made for the purpose of settlement, and expressly stated that damages would probably be higher if litigation were necessary. In his answer brief before the Board, the Area Director states that, when numerous settlement attempts were unsuccessful, the Department initiated suit against appellant in Federal district court.

The court held that the appeal bond requirement had deprived appellant of his right to appeal the question of breach of contract. Accordingly, the court remanded the matter to the Board for the conclusion of administrative review procedures. 8/ Briefs were filed with the Board by appellant, the Area Director, and the tribe.

Discussion and Conclusions

Appellant raises three arguments in support of his contention that he should not be held to be in breach: (1) BIA was arbitrary and capricious in declaring him to be in breach because he was at all times prior to August 8, 1980, willing to perform the contract; (2) the contract did not meet the requirements of 25 U.S.C. § 81 (1988); 9/ and (3) his obligation to perform was excused by commercial impracticality. Appellant also argues that he is entitled to restitution of his $19,000 deposit.

Appellant attempts to convince this Board that he was an innocent victim of a downturn in the lumber market and of BIA's arbitrary unwillingness to grant him an extension of time for completion of the contract and a reprieve from cutting cedar. Appellant states that he was willing to perform the contract at all times prior to August 8, 1980. In support of this argument, appellant notes that he requested an extension and reprieve from certain contract requirements on June 18, 1980. As evidence of BIA's alleged arbitrariness, appellant states that an extension was granted to the person who purchased the logging unit after he was declared to be in breach.

8/ Appeal regulations for BIA and the Board were amended during the pendency of this proceeding before the court. See 54 FR 6478 and 6483 (Feb. 10, 1989). Under the new appeal procedures, decisions issued by BIA Area Directors may be appealed to the Board.

9/ Although the contract at issue here was approved in 1980, the relevant United States Code provisions have not been changed. Therefore, all further references to the United States Code are to the 1988 edition.

[1] A review of the record shows that appellant's attempt to characterize himself as "willing to perform" the contract is disingenuous at best. Appellant failed to take any steps toward performing the contract: he did not tender the remainder of the advance deposit, which was due under the regulations and contract on or before February 13, 1980; he was dilatory in providing a working plan and then failed to undertake operations in accordance with the plans he did submit; he made no effort to bring men or equipment to the work sites. The record suggests that appellant was overextended when he should have begun performance on the contract and might well have lacked the men and equipment necessary for him to perform. Although appellant requested an extension on June 18, 1980, this request was made 2 months after he had agreed to begin performance. In his July 3, 1980, letter to BIA, appellant clearly stated that he had no intention of performing the contract "until market conditions improve." Since there was no way to determine when market conditions might improve to appellant's satisfaction, this statement constituted an anticipatory breach.

The Board holds that appellant breached the contract both through his failure to make the required advance deposit and through his failure to commence operations. Cf. Walch Logging Co. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 90 I.D. 88 (1983); Appeal of Timberland Management, 21 IBCA 199, 213-14, 92 I.D. 340, 349 (1985); Appeal of SRM Manufacturing Co., 7 IBCA 323, 326 (1975); Defiance Plateau Unit Timber Sale Contract, Memorandum of the Solicitor, Oct. 23, 1933, I Op. Sol. on Indian Affairs 376, 378 ("Failure to commence cutting operations within a reasonable time after the beginning of the period within which certain cutting operations were to be completed results in a breach of the contract by the Purchaser and a termination of its rights under the contract").

Appellant attempts to avoid the consequences of a finding of breach by arguing that the contract was void because it failed to comply with the requirements of 25 U.S.C. § 81. Section 81 provides detailed requirements for contracts "made by any person with any tribe of Indians."

[2] There are numerous problems with this argument. Initially, appellant failed to raise this argument to the Area Director. The Board has frequently held that it is not required to consider arguments and issues that are raised for the first time on appeal. See, e.g., Estate of Alice Jackson (John), 17 IBIA 162, 165 (1990), and cases cited therein..

[3] Second, appellant lacks standing to raise this argument. Assuming for the limited purpose of this part of the discussion that section 81 applied to this contract, the section was passed for the benefit and protection of Indians, not of those contracting with Indians. The statute clearly states the remedy for violation of its provisions:

> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services * * * may be

> recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy. [Emphasis added.]

As a person contracting with an Indian tribe, appellant is not within the zone of interest established by the statute. See, e.g., Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Essentially, the standing question * * * is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"); Enterprise Management Consultants, Inc. v. United States, 685 F. Supp. 221 (W.D. Okla. 1988), aff'd, 883 F.2d 890 (10th Cir. 1989) ("No matter what may be the nature of a contract falling under section 81, the purpose of the statute is to protect the interests of Indians. This is old law * * *. [N]o rights emanate from section 81 for the benefit of or economic protection of [a person contracting with an Indian tribe]" (685 F. Supp. at 222-23)). Cf. Clausen v. Portland Area Director, 19 IBIA 56, 60 (1990), and cases cited therein (a non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility).

[4] Third, even if the Board were to reach this issue, appellant's arguments for the application of section 81 are unavailing. Appellant argues that the sale of Indian timber is governed by the requirements in section 81, and that 25 U.S.C. § 407, which explicitly deals with the sale of Indian tribal timber, did not either explicitly or by implication repeal the requirements of section 81 relating to the form of contracts. Therefore, he contends, failure to follow the requirements of section 81 rendered the contract void.

The sale of Indian timber is authorized by 25 U.S.C. §§ 406 and 407. Section 407 10/ provides:

> The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales * * * shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

The Secretary has promulgated regulations governing the sale of Indian timber in 25 CFR Part 163, formerly Part 141. Neither the statute nor the regulations incorporate section 81.

It has been held that prior to the enactment of section 407 in 1910, Indian tribes lacked authority to sell timber by a sale or contract separate from a contract for the improvement of the underlying realty. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145-47 (1980); United

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10/ Section 406, which relates to the sale of timber on allotted lands, is not applicable in this case.

States v. Algoma Lumber Co., 305 U.S. 415, 422-23 (1939); United States v. Paine Lumber Co., 206 U.S. 467, 473 (1907); Eastman v. United States, 31 F. Supp. 754, 760 (W.D. Wash. 1940), reversed on other grounds, 118 F.2d 421 (9th Cir. 1941) (Although reversing, the circuit court repeated that "[p]rior to [§§ 406 and 407], there was no general authority to sell the timber on Indian lands"). In discussing the effects of the enactment of section 407 and the promulgation of regulations implementing the authority to sell timber, the courts have consistently noted that the statute and the regulations provide a comprehensive scheme for the regulation of the sale of Indian timber. No court has held that section 81 must be read into that statutory and regulatory scheme. The cases appellant cites do not so hold.

Finally, even if appellant's argument that section 81 applies to this contract were accepted, his arguments as to how the contract is deficient under that section are incorrect. Appellant alleges deficiencies in the contract because (1) it was not personally signed by the Secretary of the Interior and the Commissioner of Indian Affairs, (2) it did not name all parties-in-interest because it did not name United Pacific as the surety, (3) it did not contain the residences and occupations of the parties, and (4) it did not state the scope of authority of the Tribal Secretary and did not specify the reasons for exercising whatever authority he had.

The Area Director's responses, which the Board finds persuasive, indicate that (1) the contract was signed by the Acting Area Director, Portland Area Office, BIA, to whom the Secretary's and Commissioner's authority has been properly delegated; (2) United Pacific did not need to be named in the contract because it was not a "party-in-interest" to the contract. As surety, United Pacific has an interest in appellant's performance under the contract and is an "interested party" within the meaning of the Department's appeal regulations in 25 CFR 2.2. 11/ The parties-in-interest to the contract, however, are appellant and the tribe; (3) the contract included the residences and occupations of the parties-in-interest; i.e., appellant, a logging company residing in Ravensdale, Washington, and the tribe, an Indian tribe, residing in Neah Bay, Washington; and (4) the authority of the Tribal Secretary was set forth as Tribal Resolution No. 89-79. The reasons for the exercise of authority are clearly to enter into a contract for the sale of tribal timber. The Board thus holds that even if section 81 applied to this contract, its requirements have been met.

As a corollary to his argument that the contract was void because it did not meet the formalities required by section 81, appellant contends that he is entitled to restitution of the $19,000 deposit he made with his bid. Since the Board has found against appellant's arguments under section 81, appellant is not entitled to restitution of his bid deposit on the grounds that the contract was void.

Finally, appellant contends that he was excused from performing the contract under the doctrine of commercial impracticality. He alleges that

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11/ Section 2.2 defines "interested party" as "any person whose interests could be adversely affected by a decision in an appeal."

this doctrine excuses performance "when the performance becomes extremely costly or onerous, although not literally impossible" (Opening Brief at 13). Appellant's argument is based upon his statements that the timber market in the Pacific Northwest took a downturn after President Reagan was elected in 1980. He contends that the inquiry that should be undertaken "is whether the intervening changes of circumstances were so unforeseen that the risk of difficulty should not be borne by the promisor." Id. at 14.

A three-step analysis for the application of the doctrine of commercial impracticality was set forth in Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315-16 (D.C. Cir. 1966):

> First, a contingency--something unexpected--must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, the occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail.

See also Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1317 n.13 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979); Denali Seafoods, Inc. v. Western Pioneer, Inc., 492 F. Supp. 580, 582 (W.D. Wash. 1980).

[5] Appellant's argument first presupposes that a downturn in the timber market was completely unforeseeable or unexpected. It may be true that at the time the contract was entered into, both appellant and the tribe hoped that the market would remain high. It is, however, common knowledge that the timber market is very volatile. The possibility of drastic and rapid changes in the market is one of the primary reasons for entering into the type of fixed-rate contract at issue here. The very nature of the contract indicates that the possibility of a downturn in the market was contemplated by at least the tribe.

Furthermore, most of the timber being disposed of under this contract was not standing timber, but rather downed timber, subject to rapid deterioration in value. Time was obviously of the essence. This fact was further emphasized by the very limited term for performance of the contract. Appellant knew or should have known when he submitted his bid that the tribe could not afford, and did not intend, to wait out any downturn in the market. Appellant has failed to show that something unexpected occurred.

The contract also clearly allocated all of the risk of a market downturn--and the benefits of a continued or increasingly high market--to appellant. This fact was evident from the terms of the contract, which were available to appellant when he submitted his bid. See, e.g., Pauley Petroleum, Inc., supra; J. A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973); Peerless Casualty Co. v. Weymouth Gardens, Inc., 215 F.2d 362 (1st Cir. 1954); Uniform Commercial Code § 2-615 (Wash. Rev. Code 62 A. 2-615), Comment 4; June 12, 1986, decision of the Acting Assistant Secretary - Indian Affairs, in administrative appeal of Mayr Brothers Logging Co.; Defiance Plateau Unit Timber Sale Contract, supra.

Furthermore, appellant has failed to show that performance of the contract was commercially impracticable. Appellant's argument is, in essence, that he could not market the timber with a profit margin acceptable to him. He has neither shown nor alleged that the costs for performing the contract had risen. See, e.g., Peerless Casualty Co., supra; SRM Manufacturing, supra; Pauley Petroleum, Inc., 591 F.2d at 1319 ("[T]he law requires an objective view of commercial frustration or impossibility - the fact that a risk makes the contract unreasonable for a particular party is no excuse"). He failed to show that the contract could not be performed; he merely demonstrated that he did not want to perform the contract under the existing market conditions. Appeal of Dillingham Maritime, 19 IBCA 168, 174 (1983) ("There is no relief available to a contractor * * * merely because he cannot perform the contract in a manner that will sustain his anticipated profit margin"); Defiance Plateau Unit Timber Sale Contract, supra, I Op. Sol. on Indian Affairs at 379, and cases cited therein ("The fact that the time when cutting was required to be done was financially inopportune or even most difficult is no legal excuse for the Purchaser's failure"). Appellant also did not show good faith in attempting to commence operations under the contract. See Pacific Trading Co. v. Mouton Rice Milling Co., 184 F.2d 141, 147 (8th Cir. 1950) ("[T]he basic rule of the law of contracts [is] that the purpose of every contract is to bind the parties to performance. A party seeking to escape his contractual obligations carries the burden of establishing his good faith in refusing to perform for one of the reasons recognized by law as an excuse for non-performance"). For this last reason, the Board also rejects appellant's argument that the extension of time granted to the purchaser of the logging unit on resale showed that BIA was arbitrary and capricious in its dealings with him.

Based upon these considerations, the Board holds that the doctrine of commercial impracticality does not apply to this situation because the downturn in the timber market was not a contingency that was unexpected or unforeseen, the risk of any such downturn was allocated to appellant by the contract, and appellant has failed to show that performance of the contract was in fact commercially impracticable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Area Director's August 8, 1980, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge